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Supreme Court of the United States

OCTOBER TERM, 1952

No. 340

WILLIAM B. FOWLER, APPELLANT,

vs.

STATE OF RHODE ISLAND

APPEAL FROM THE SUPREME COURT OF THE STATE OF RHODE ISLAND

REPLY BRIEF FOR APPELLANT

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MAY IT PLEASE THE COURT:

The appellee says that its law should be sustained because it is limited to activities that may lead to disorder. It does not purport to prohibit an assembly under circumstances where there is a clear and present danger of riot or disorder. If it were such a law and there were proof that a clear and present danger of riot existed, a different question would be here involved. Compare *Terminiello* v. *Chicago*, 337 U. S. 1, with *Feiner* v. *New York*, 340 U. S. 315. The holding of a religious meeting in a park does not *per se* or *ipso facto* present a clear and present danger of riot. See

Sellers v. *Johnson*, 163 F. 2d 877 (C. A. 8th). The law here involved is an outright prohibition of the use of the right and is no prohibition of an abuse of the use of the right, the limit of the police power.—*De Jonge* v. *Oregon*, 299 U. S. 353, 364-365; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96; *Hague* v. *C. I. O.*, 307 U. S. 496, 515-516.

The State of Rhode Island says that the ordinance permits religious *services* in all parks but it does not allow religious speeches, talks or assemblies. The distinction is one without a difference. Since the Catholics can conduct mass in the park, it is difficult to see how there is no discrimination. Mass is a religious assembly. It involves religious speech by a priest. The words of a Catholic priest convey ideas just like the words of a Protestant minister. This interpretation brings the enforcement of the law into collision with the holdings of this Court in *Niemotko* v. *Maryland*, 340 U. S. 268, and *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The state says a prayer may be given and that it would not be a violation of the law. A prayer, like a speech, is heard by the people assembled as much as is a speech to a religious group. A prayer may be as provocative, if not more so, than a speech. Merely because it is a prayer does not change the nature of the message heard by the listener. There are records of provocative prayers in the Bible, where the destruction of enemies of Jehovah's people was the object of supplication. Surely, if these provocative and controversial prayers had been given in a park or public place, they would have been as disorderly as an inflamatory speech made to the listeners which appealed to them, on religious grounds, to take action.

It is argued by appellee that the religious talk by appellant was not a part of a religious "service", which (if it were a religious "service") would be permitted. This argument by the State of Rhode Island flies in the teeth of

what this Court said in *Burstyn, Inc.* v. *Wilson,* 343 U. S. 495. See especially note 18, page 505 of the opinion. It is not within the province of the law, under the doctrine of separation of church and state, to say what is or is not a religious service. This Court does not have a religion. The Court knows only the religion of the law. The religion of the law recognizes all personal religions and does not prescribe what is orthodox. The judges of courts cannot say what is or is not a religious service. See *Kedroff* v. *St. Nicholas Cathedral,* 73 S. Ct. 143, at pages 153-154, note 23.

The undisputed evidence showed that the meeting in question was a religious meeting and that a religious sermon was delivered. This made the whole transaction "religious" within the view of this Court and the meaning of the Constitution. If the ordinance could not prohibit a religious service, then it could not stop a religious talk or constitutionally punish one for holding a religious assembly.

The courts are not authorized to proceed to judge the qualifications of a minister of a religious organization on the basis of the personal views of the judges of the court. The Ontario Court of Appeal, in *Donald* v. *Board of Education,* [1945] O. R. 518, said: " . . . it would be misleading to proceed on any personal view on what such exercise might include or exclude." If courts were permitted to judge according to their personal knowledge of what constitutes the duty of a minister of a religious organization, based on the experience and knowledge obtained from association with ministers of popular orthodox denominations, the law would change with the complexion of every judge. In that event every time there should occur a change in the personnel of the court that would give rise to a change in the law. If it is permissible for the judges of a court to decide that a minister, duly ordained according to the custom of his faith and regularly serving as a minister, is not entitled to the benefits of the Constitution because the activity of the minister is not performed in a way with which the judges

are personally familiar and approve of as proper preaching—if this form of judicial determination were permitted in arriving at the construction to be placed upon the Constitution, a Catholic judge could decide that a Presbyterian minister is not a minister under the Constitution and the Baptist judge could decide that a Catholic priest is not a minister of religion within the law. The illustrations could be increased *ad infinitum*. Under such process, instead of being governed by law, the people would be governed by men. The protection of the Constitution would operate according to the swing of the pendulum of decisions as the religious complexion of the court changed with the appointment of judges.

It has been judicially declared that were "the administration of the great variety of religious charities, with which our country so happily abounds, to depend upon the opinion of the judges, who from time to time succeed each other in the administration of justice, upon the question whether the doctrines intended to be upheld and inculcated by such charities, were consonant to the doctrines of the Bible; we should be entirely at sea, without helm or compass, in this land of unlimited religious toleration". —*Knistern* v. *Lutheran Churches,* 1 Sandf. Ch. 439, 507 (N. Y.).

All religions, however orthodox or heterodox, Christian or pagan, Protestant or Catholic, stand equal before the law which regards "the pagan and the Mormon, the Brahmin and the Jew, the Swedenborgian and the Buddhist, the Catholic and the Quaker as all possessing equal rights". —*Donahue* v. *Richards,* 38 Me. 379, 409. Cf. *People* v. *Board of Education,* 245 Ill. 334, 349; *Grimes* v. *Harmon,* 35 Ind. 198, 211.

Protection is therefore afforded not only "to the different denominations of the Christian religion, but is due to every religious body, organization or society whose members are accustomed to come together for the purpose of

worshipping the Supreme Being". (*State* ex rel. *Freeman* v. *Scheve*, 65 Neb. 853, 879) It is now clear that the legislative, executive and judicial policy concerning religious organizations, beliefs, and practices is one of masterly inactivity, of hands off, of fair play and no favors. (*People* v. *Steele*, 2 Bar. 397) "So far as religion is concerned the *laissez faire* theory of government has been given the widest possible scope."—*State* ex rel. *Freeman* v. *Scheve*, *supra*.

"History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities."—*Minersville* v. *Gobitis*, 310 U. S. 586.

"No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs. And the Jehovah's witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure. Theirs is a militant and unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes. See Mulder and Comisky, 'Jehovah's Witnesses Mold Constitutional Law,' 2 Bill of Rights Review, No. 4, p. 262. To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom." —*Prince* v. *Commonwealth*, 321 U. S. 158.

Even clergymen are incompetent to give any help to the Court in this matter, in which the Court must decide a legal

question, the invalidity of the ordinance, as is well demonstrated by the holding of the United States Court of Appeals for the Second Circuit, in *United States* v. *Balogh*, 157 F. 2d 939. In that case one of Jehovah's witnesses who was preparing himself for the ministry claimed exemption from the draft act as a student. In considering and in denying him his claim for exemption the tribunal referred him to a panel of theologians (orthodox clergymen) and thereafter considered the report and opinions of the panel. The Court held that the action of the tribunal was invalid. It was decided that the beliefs, practices and structure were not subject for opinion by expert orthodox clergymen and that the only person qualified to give opinion on such unorthodox and heterodox group would be one trained and qualified by the group itself or at least one who had studied the organization from the inside. The court said, among other things, that "it would be a misapprehension to exclude such sects from the purpose of Congress, to which we are to impute, not only a tolerance of, but a positive concern for, the preservation of all creeds that can be grouped within the widely comprehensive term 'religion' . . . but, even though they were Protestant ministers, they could have no proper part in an inquiry involving Jehovah's Witnesses".

It seems obvious that, for purposes of decision in this case, the Court must hold that the talk of appellant was a part of a religious service, which appellee admits the ordinance cannot stop and which stopping in this case violates the Constitution.

The appellee disingenuously casts aside all the permit cases cited by appellant. Then it inconsistently relies on a permit decision, *Davis* v. *Massachusetts*, 167 U. S. 43, which is now defunct as an authority. Why this old and overruled

decision is in point and the later permit decisions like *Niemotko* v. *Maryland*, 340 U. S. 268, and *Kunz* v. *New York*, 340 U. S. 290, are not in point cannot be justified or sustained by law or reason.

Respectfully,

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January, 1953.